No. 11,126

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA
(a corporation),
Appellee.

APPELLEE'S SUPPLEMENTAL MEMORANDUM ON JURISDICTION.

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FILED
JUN 6 - 1946
PAUL P. O'BRIEN

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Topical Index

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INTRODUCTORY STATEMENT.

This Court requested a memorandum of authorities with respect to its admiralty jurisdiction of the damage to appellee's products in the shore tanks. Appellant has submitted a memorandum in which it attempts to split appellee's case into two causes of action, one in contract and one in tort.

Appellant is clearly in error in stating that appellee's case is comprised of two causes of action. The libel, as amended, (3-6, 22-23, 42)* sets forth but one cause of action for a breach of the contract of carriage and, as a

*Numbers in parenthesis, unless otherwise noted, refer to pages of the Apostles on Appeal.

result of that breach, alleges that (a) appellee's cargo on the ship was contaminated and (b) the contents of appellee's shore tanks were contaminated. The cause of action relied upon by appellee to establish appellant's liability arose *on the ship,* and all the damages sought are those which resulted from this breach of contract, and which, from the circumstances, were within the reasonable contemplation of the parties.

In this case appellee could maintain its action either for breach of the contract of carriage or for appellant's tortious act in negligently commingling the cargo on discharge and negligently failing to furnish a seaworthy ship. Appellee chose to proceed on breach of the contract of carriage. However, as we will point out, regardless of the form of action, the damages suffered by appellee would include those resulting from the contamination of the products in the shore tanks, and such damages would be within the admiralty jurisdiction of this Court.

I.

THE PRESENT SUIT IS BASED ON A CONTRACT OF CARRIAGE WITHIN ADMIRALTY JURISDICTION, AND THIS COURT HAS JURISDICTION TO AWARD ALL PROVABLE DAMAGES RESULTING FROM A BREACH OF THAT CONTRACT; AND THE LOCALITY WHERE THE DAMAGE OCCURRED IS IMMATERIAL.

Paragraph 7 of the libel (4, 5) sets forth that appellee entered into an agreement with appellant under which appellant agreed to carry the cargo separately and in good order and condition and unload it at the destination; and paragraph 9, as amended (22, 23), alleges that appellant

"not regarding their duty in that respect *nor the promise and undertaking aforesaid,*" did not convey or deliver the cargo in good order and condition, "but on the contrary failed to exercise due diligence to make said vessel seaworthy, * * * and failed to properly or carefully load, handle, stow, carry, care for or discharge said cargo," as a result of which the cargo became contaminated and when delivered a portion thereof was discharged into a tank containing uncontaminated diesel furnace oil, thereby contaminating this oil, and a portion thereof was discharged into a tank containing uncontaminated gasoline, thereby contaminating this gasoline. The further allegations are that from the circumstances appellant could reasonably have understood that the cargo would be received in shore tanks already partly full and that by reason of the contamination of the cargo and the products in the tanks, appellee suffered damage.

It is clear that the action is based on breach of the contract of carriage and not on a tort. There is no allegation of negligence in the libel, as amended. (See *Pillsbury Flour Mills Co. v. Interlake S.S. Co.* (W.D., N.Y.), 36 F. (2d) 390, 391.) It is axiomatic that actions on contracts of carriage, whether under charter party, bill of lading, or both, are within the admiralty jurisdiction of this Court.

Morewood et al. v. Enequist, 64 U.S. (23 How.) 491;
Matson Navigation Co. v. U.S., 284 U.S. 352, 358;
Armour & Co. v. Ft. Morgan S.S. Co., 270 U.S. 253, 259;
Benedict on Admiralty, 6th Ed., Vol. I, p. 282.

Any allegations, evidence or arguments which may have sounded in tort in this case were merely descriptive of the

manner in which appellant failed to perform its contract and did not change the suit into a tort action.

> *Pacific Coast S.S. Co. v. Bancroft-Whitney Co.* (9th C.C.A.), 94 Fed. 180, 194 (reversed on other grounds, 180 U.S. 49);
>
> *Dittmar v. Frederick Starr Contracting Co.* (2d C.C. A.), 249 Fed. 437, 439.

From the record it is apparent that the case was tried and judgment rendered on the basis of a breach of the contract of carriage, and that the damages assessed were those which resulted from the breach and which, from the circumstances and the experience of the parties at the time the contract was entered into, were within the reasonable contemplation of the parties. (See opinion of the District Court, 35-37.) In this regard the District Court, after referring to a clause of the charter party providing that damages for breach thereof shall include all provable damages, states (37):

> "Thus, the damage to the oil in the storage tank *being provable as a breach of the undertaking* of the carrier, paragraph 7 should not be so construed as to limit recovery as provided in said paragraph 34" (emphasis ours).

Since the action for breach of this contract of carriage is clearly within the admiralty jurisdiction of this Court, it follows that this Court is empowered to dispose of all matters arising out of the contract and all damages suffered. This Court, in the case of *Union Fish Co. v. Erickson* (9th C.C.A.), 235 Fed. 385 (affirmed 248 U.S. 308), quoted the following apt language in its opinion (p. 386):

> "In Church v. Shelton, 2 Curt. 271, 274, Fed. Cas. No. 2,714, Judge Curtis said that, the contract being maritime, the admiralty—
>
> 'will proceed to inquire into all its breaches, and *all the damages suffered thereby,* however peculiar they may be, and whatever issues they may involve' " (emphasis ours).

And as was said by the court in *Rice v. Charles Dreifus Co.* (2d C.C.A.), 96 F. (2d) 80, jurisdiction in admiralty depends (p. 83) "* * * upon the cause of suit which libelant brings before the court; if that be once maritime, the court may dispose of it completely without the need of any other suit in the same, or any other court; * * *"

What appellee seeks to recover is damages for breach of a contract of carriage. This Court, in assessing damages, will apply the rule of *Hadley v. Baxendale* (1854), 23 L.J., Ex. 179, and include all the loss suffered which was properly provable as a result of this breach of a maritime contract.[1] Whether some of this damage occurred ashore is immaterial so far as the jurisdiction of the court is concerned. Admiralty courts constantly award damages which occur on shore for the breach of a maritime obligation.[2]

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[1]Authorities that such damage was within the reasonable contemplation of the parties are set forth in Appellee's Brief, pages 25-33.

[2]Some examples are:

(1) Maintenance and cure, a maritime obligation, covers injuries incurred ashore.

Aguilar v. Standard Oil Co., 318 U.S. 724;

The Betsy Ross (9th C.C.A.), 145 F. (2d) 688.

(2) Repairs to a ship while in dry dock or upon land are within admiralty jurisdiction because the contract for such repairs is a maritime obligation.

North Pac. S.S. Co. v. Hall Bros. Co., 249 U.S. 119.

The court in the case of *Armco International Corporation v. Rederi A/B Disa* (2d C.C.A.), 151 F. (2d) 5, cited in Appellee's Brief, pages 27-28, assessed damages to the iron plates which were injured after being discharged from the vessel on the ground that the damages occurring ashore resulted from a maritime transaction. The court states (p. 8) that "the damage which did happen ashore was the direct result of the negligence of the ship while the plates were on board." In other words, the negligent breach of the maritime contract was the direct cause of the damage suffered after the iron plates were discharged and on shore.

Appellant's contention that its liability ended at the ship's rail has already been rejected by the district court

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(3) Damages for failure to carry goods such as expenses of holding goods on shore have been allowed.
Rotterdamsche Lloyd v. Gosho Co. (9th C.C.A.), 298 Fed. 443, certiorari denied 266 U.S. 621.

(4) For purposes of admiralty jurisdiction the carriage of goods includes the discharge even though that may include acts performed ashore.
The Milwaukee Bridge (S.D., N.Y.), 291 Fed. 711.

(5) This may include storage at the end of the carriage.
Evans v. New York & P.S.S. Co. (S.D., N.Y.), 145 Fed. 841.

(6) And storage ashore made necessary as a result of cargo contamination is a proper item of damage.
Philippine Refining Corporation v. United States (E.D., N.Y.), 33 F. (2d) 974; affirmed 41 F. (2d) 1010.

(7) Even though an action for damage to a dock could not be maintained in admiralty, where the dock owner brought suit at law against a towing company operating the vessel at the time, the admiralty court took jurisdiction to a separate suit by the towing company against the vessel based on the towing contract under which the vessel indemnified the tug owner from such claims.
Moran Towing & Transportation Co. v. United States (S.D., N.Y.), 56 F. Supp. 104.

To the same effect:
Moran Towing & T. Co. v. Navigazione Libera Triestina, S.A. (2d C.C.A.), 92 F. (2d) 37.

in this case (see supra, p. 4) and by the court in *Armco International Corporation v. Rederi A/B Disa,* supra, which states (p. 8): "We know of no authority that liability for the consequences of such negligence ends when the cargo goes over the rail, and such a doctrine would be absurd to the last degree." True, the delivery of the cargo was complete at this point. However, prior to the delivery, while the cargo was still at the risk and responsibility of appellant, it had been contaminated. The cause of action had arisen before delivery, some damage had occurred, and discharge over the ship's rail did not exonerate appellant from the further consequences proximately resulting from its breach of contract.

We submit that the contamination of appellee's products in the shore tanks was a proximate result of the breach by appellant of the maritime contract of carriage, that the damages suffered thereby were within the reasonable contemplation of the parties, and that the entire matter of damages is within the admiralty jurisdiction of this Court.

II.

EVEN IN TORT ACTIONS, ADMIRALTY WILL AWARD DAMAGES OCCURRING ON LAND WHICH ARE A PROXIMATE RESULT OF THE MARITIME TORT.

Even had this action been brought in tort, the admiralty court would have had jurisdiction of the damage occurring to the products in the shore tanks. The jurisdiction would result because the court would merely be assessing damages proximately resulting from a maritime tort, and the

fact that a portion of the damages suffered occurred on land would not oust jurisdiction. The tort was complete when the two products carried were mingled on the vessel; it was a maritime tort, and the court sitting in admiralty would have jurisdiction, not only of the damage occurring on the vessel, but also of all damage proximately resulting from the tort, wherever such damage may have occurred.

In *The Admiral Peoples,* 295 U.S. 649, a passenger was injured when he fell to the dock from a defectively rigged gangplank. The court held that the gangplank was part of the vessel so that the locality was maritime and the cause of action arose from a breach of duty owing him while still on the ship; hence admiralty had jurisdiction. The fact that the ultimate injury occurred on the dock, i.e., land, was held to be immaterial, the Supreme Court citing the following language from *The Strabo* (2d C.C.A.), 98 Fed. 998, 1000:

> "The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water."

Likewise, in *Minnie v. Port Huron Co.,* 295 U.S. 647, the Supreme Court held that the claim of a longshoreman, swept from the deck of a vessel upon a wharf where he was hurt, came within the admiralty jurisdiction, stating that it was the blow received on the vessel in navigable water which gave rise to the cause of action and the maritime character of the cause of action was not altered by the fact that the man suffered the injury on land.

See also

The Shangho (9th C.C.A.), 88 F. (2d) 42; certiorari denied 301 U.S. 705.

In the case before this Court the same rule would apply. The contamination of the cargo on the vessel in navigable waters gave rise to a cause of action for a maritime tort. The maritime character of the cause of action being complete, it is not of importance to admiralty jurisdiction that a part of the damage suffered and proximately resulting from the maritime tort occurred on land.

The numerous cases where, although the negligent act occurred on navigable waters, the cause of action of the complaining party did not arise until damage occurred on land are not in point. *The Plymouth*, 70 U.S. 20, cited by appellant, is such a case. It was not until the fire reached the dock that the libelant's cause of action in that case arose, and therefore the tort was nonmaritime in locality. Contrast that case with *The Admiral Peoples,* supra, where the libelant's cause of action was complete on the gangplank, and the consequential damages occurred on the dock and the distinction becomes plain between a maritime tort with consequential damages occurring ashore and a nonmaritime tort which arose on shore.

III.

THE QUESTION OF THE AMOUNT OF DAMAGES AWARDED IN THIS CASE SHOULD NOT AFFECT THE AMOUNT OF ATTORNEY'S FEES AWARDED.

The question of the reasonableness of the attorney's fees awarded by the district court in this case has already been argued in the briefs heretofore filed with this Court. Assuming as we must that the district court in awarding the sum did so on the basis of what were the reasonable value of the services rendered in the case, it is difficult to see the relevancy of appellee's argument that the amount of fees should be reduced if the judgment is reduced. Certainly the reasonable value of these services has not been diminished in any way, and if the award is a proper item of damage under the charter party, the amount thereof does not depend on whether the damages recovered in the action are reduced upon appeal for some reason.

Dated, June 5, 1946.

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